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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

EUGENE ROBERT WALLACH,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT H. BORK
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 862-5851
Counsel of Record for Petitioner

ROBERT J. GIUFFRA, JR.
125 Broad Street
New York, New York 10004

ROBERT A. CULP
334 East 55th Street
New York, New York 10022

DENNIS P. RIORDAN
RIORDAN & ROSENTHAL
523 Octavia Street
San Francisco, California 94102
Of Counsel

March 2, 1993

QUESTIONS PRESENTED

1.a. Whether property is "taken by fraud," within the meaning of the National Stolen Property Act, 18 U.S.C. § 2314, when the prosecution fails to show that anyone owning or controlling the property was deceived by the defendant's statements (here, in invoices for valuable services written to the specifications of a company's directors, officers and majority shareholders)?

1.b. Whether, consistent with due process, this statutorily defined element of the crime of taking by fraud can not only be omitted by the prosecution but the burden of disproving that anyone was deceived be shifted to the defendant?

2. Whether, in raising a claim under the Double Jeopardy Clause of prosecutorial misconduct designed to avoid an acquittal, the defendant—without the benefit of an evidentiary hearing—must prove the prosecutor's subjective state of mind or whether the defendant may show the prosecutor's intent by objective facts?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Eugene Robert Wallach respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this action on November 9, 1992.

OPINIONS BELOW

The opinion of the Second Circuit is reported at 979 F.2d 912 (2d Cir. 1992), and is reprinted in the appendix hereto, p. A1, *infra*. The opinion and order of the United States District Court for the Southern District of New York (Owen, D.J.) is reported at 788 F. Supp. 739 (S.D.N.Y. 1992), and is reprinted in the appendix hereto, p. A21, *infra*.

JURISDICTION

On August 8, 1989, petitioner was found guilty of various federal offenses. On May 31, 1991, the Second Circuit reversed his convictions on the ground that the prosecution introduced testimony it should have known was perjured. *United States* v. *Wallach*, 935 F.2d 445 (2d Cir.

1991) ("*Wallach I*"). After the government indicated that he would be retried, petitioner moved to dismiss the indictment under the Double Jeopardy Clause. The district court denied that motion on March 30, 1992 (A31-A33), and the Second Circuit affirmed on November 9, 1992. A timely petition for rehearing with a suggestion of rehearing in banc was denied on January 15, 1993 (A20). This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ."

Section 2314 of the National Stolen Property Act provides, in relevant part: "Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . . Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

STATEMENT OF THE CASE

This petition presents a question of substantial importance to corporations and to all persons who sell goods or services to them: Did Congress, in the National Stolen Property Act, 18 U.S.C. § 2314, intend to create a federal corporate false statement law so that any false statement in connection with billing is a crime even though the requested goods or services are provided and no one is deceived in making payment?

Here, petitioner worked on a variety of matters as a lawyer for a corporation. He was asked by its directors and officers (who were also the majority shareholders) to perform certain services and then to submit two letters purportedly mischaracterizing those services. The government admits that petitioner performed the services, and that his work was lawful, benefitted the company and justified his fees.

The Second Circuit rejected petitioner's challenge to the legal sufficiency of the government's proof, holding (i) that a "fraud upon the corporation is established by showing that the property was obtained by false representations made to the corporation," even if none of the directors and officers were deceived by those representations; and (ii) that it was "a matter of defense" to show that *all* of the shareholders approved the transactions if there were any misrepresentations in billing. *United States* v. *Wallach*, 979 F.2d 912 (2d Cir. 1992) ("*Wallach II*") (A14).

This Court should grant certiorari because the Second Circuit's construction of Section 2314—which is contradicted by the statutory language—conflicts with decisions of the Fourth and Sixth Circuits requiring the government to prove rather than presume that a corporation (through its directors, officers, or shareholders) detrimentally relied upon a false statement in parting with property.

Because many major corporations are located in the Second Circuit, the decision below threatens the Nation's business community by "mak[ing] a surprisingly broad range of unremarkable conduct a violation of federal law." *Williams* v. *United States*, 458 U.S. 279, 286 (1982). Lawyers, accountants and other professionals working for corporations on mergers, criminal investigations and other sensitive matters are often asked to draft bills, designed to maintain secrecy, that might be viewed as misrepresenting the nature of services they are requested to provide. They are also

sometimes asked to bill their services to matters other than those that are the most relevant. Such arrangements are now criminal absent proof that all shareholders approve.

In addition, this petition raises the important question of what a defendant must show to bar a retrial on grounds of prosecutorial misconduct. Petitioner's double jeopardy motion was based on a showing that the prosecutors knew they were offering perjured testimony and did so to avoid an acquittal. Petitioner demonstrated that the record permitted no other conclusion.

The Second Circuit, contrary to this Court's decision in *Oregon* v. *Kennedy*, 456 U.S. 667, 675, 679-80 (1982), required petitioner—without even the benefit of an evidentiary hearing—to show the prosecutors' subjective state of mind about the prospects for acquittal if their witness' perjury became known to the jury. (A10). This legal rule places an impossible burden on defendants. If compelling objective facts are insufficient as a matter of law, double jeopardy claims must fail unless prosecutors affirmatively confess their misconduct and malevolent state of mind.

Factual Background

In 1987, petitioner, a former president of the Bar Association of San Francisco and Dean of the Center for Trial and Appellate Advocacy at Hastings College of Law, was indicted for alleged crimes in his dealings with the Wedtech Corporation ("Wedtech"), a South Bronx company that hired persons from disadvantaged backgrounds. It is conceded that petitioner performed lawful and valuable work for Wedtech, and that he had no knowledge of the fraud by its executives that caused the company's collapse.

On the basis of an entirely novel interpretation of Section 2314, the government prosecuted petitioner for

providing two letters, written at the request of Wedtech's directors and officers, that allegedly mischaracterized the work they had asked him to perform. The letters became the basis for the predicate acts supporting a charge under the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1961 *et seq.*[1]

The government's case rested on the testimony of Anthony Guariglia, Wedtech's former president, and Mario Moreno, its former vice-chairman, both of whom, unknown to petitioner, had stolen millions from the company. These witnesses testified against petitioner pursuant to cooperation agreements that enabled them to obtain lenient sentences.

The government's proof established the following. In 1981, Wedtech officials were introduced to petitioner, a friend of Edwin Meese III, then Counsellor to President Reagan and subsequently Attorney General. Petitioner agreed to assist the company by contacting Meese in an effort to obtain government contracts. 935 F.2d at 450. The indictment did not charge—nor could it—that petitioner's lobbying was illegal, since private citizens may freely lobby public officials. Petitioner also performed at the request of the directors and officers other valuable legal and management services for Wedtech. *Id.* at 466.

In September 1983, Wedtech's directors and officers agreed to pay petitioner $125,000 for his past lobbying and legal work. They asked him to provide a letter reflecting that this fee was for "consultation relative to" the company's

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[1] Petitioner was also indicated for allegedly conspiring to have a conflict of interest with respect to federal employment in violation of 18 U.S.C. §§ 203, 371, even though he never became, or was even informed that he might become, a full-time federal official. This charge, like the Section 2314 charges, was without precedent.

initial public stock offering, even though, according to the government, he performed little work on the offering. 935 F.2d at 451.

In September 1984, Wedtech's directors and officers agreed to pay petitioner $300,000 as a prepayment for his services in 1985 and 1986. At their request, he submitted a letter attributing this payment to services he performed in connection with the company's acquisition of a shipyard. This letter, like the earlier "public offering" letter, was alleged to have misrepresented the true basis for the payment—petitioner's lobbying. The government also claimed that the payment was structured in this manner to conceal payments to petitioner for services he would perform if, and when, he became a public official. 935 F.2d at 451-52.

After eight days of deliberations, petitioner was convicted of violating RICO, Section 2314, and Section 371.

The Proceedings Below: Wallach I

In May 1991, the Second Circuit reversed petitioner's convictions because the prosecutors "should have known" that Anthony Guariglia, their "centerpiece" witness, had lied at trial. 935 F.2d at 457. "Guariglia's testimony was essential to the government's case; indeed, he tied all the pieces together." *Id.* at 458. "[G]iven the importance of Guariglia's testimony to the case," the Second Circuit stated its "fear" that the prosecutors "may have consciously avoided recognizing the obvious—that is, that Guariglia was not telling the truth." *Id.*

The Second Circuit also held that, regardless of the government's knowledge, the perjury, viewed as newly discovered evidence, warranted a reversal: "[A]fter reviewing the record we are left 'with a firm belief that but for the perjured testimony, defendants would most likely not have

been convicted.'" *Id.* at 458-59 (quoting *Sanders* v. *Sullivan*, 863 F.2d 218, 226 (2d Cir. 1988)).

In the course of its decision, the Second Circuit erroneously upheld the legal validity of the Section 2314 charges. While recognizing that "shareholders have no legal right to control the day-to-day affairs of a corporation" and "do not hold legal title to any of the corporation's assets," the court still found that petitioner's letters had deprived Wedtech's shareholders of a property right, *i.e.*, their "right to control" corporate spending. 935 F.2d at 462-63.

In addition, while Section 2314 does not apply to the "theft" of property taken with its owner's consent, the Second Circuit held that obtaining property by means of false letters violated Section 2314, even though Wedtech's directors and officers—the persons charged with legal control of the company's operations—had agreed to pay petitioner for the services he performed and the letters were written to their specifications. *Id.* at 935. The mere submission of false or incomplete billing information, even when a lawyer performs requested services and no one is deceived, was held to be enough to sustain a conviction under Section 2314: "[W]hen false information is intentionally provided to the corporation, a fraud on the corporation and its shareholders is committed." *Id.*

The Proceedings Below: Wallach II

Following the government's decision to retry him, petitioner moved to dismiss the indictment on double jeopardy grounds. The district court denied this motion (A31-A33), and petitioner then took an interlocutory appeal to the Second Circuit pursuant to *Abney* v. *United States*, 431 U.S. 651 (1977).

In *Wallach II*, the Second Circuit addressed petitioner's challenge to the sufficiency of the evidence introduced to convict him under Section 2314: that "no evidence had been introduced that at least one Wedtech shareholder had been deceived by the allegedly fraudulent letters he sent to Wedtech." (A13 (quoting Brief for Appellant at 28)). This claim had been raised, but not addressed on petitioner's first appeal. (A12-A13).[2]

Again accepting the premise that property may not be stolen or taken by fraud with its owner's knowledge and consent, the Second Circuit nevertheless held "that the fraud upon the corporation is established by showing that the property was obtained by false representations made to the corporation." (A14). "The Government was not required to present evidence from a shareholder that he was misled by the false representation." (A14). In fact, the court reasoned, "any claim . . . that all the shareholders consented to parting with the corporate property on the basis of false representations, is a matter of defense." (A14).

The Second Circuit also rejected petitioner's claim that he could not be retried because of prosecutorial misconduct at his first trial. (A11). While agreeing with petitioner that this Court's decision in *Oregon* v. *Kennedy*, 456 U.S. 667

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[2] Under *Burks* v. *United States*, 437 U.S. 1 (1979), an appellate reversal for insufficiency of the evidence has the same effect as a judgment of acquittal: the Double Jeopardy Clause forbids retrial. *Id.* at 18. There is uniform agreement that appellate courts must review a defendant's sufficiency claim before vacating and remanding for trial error. *See United States* v. *Quinn*, 901 F.2d 522, 529 n.5 (6th Cir. 1990); *Vogel* v. *Commonwealth of Pennsylvania*, 790 F.2d 368, 376 (3d Cir. 1986); *United States* v. *Hodges*, 770 F.2d 1475, 1477 (9th Cir. 1985); *United States* v. *Sneed*, 705 F.2d 745, 748-749 (5th Cir. 1983); *United States* v. *Morris*, 612 F.2d 483, 492 (10th Cir. 1979).

(1982), should apply to the situation "where a prosecutor apprehends an acquittal and, instead of provoking a mistrial, avoids the acquittal by an act of deliberate misconduct," the Second Circuit said that there was not a sufficient "factual predicate" to apply that rule here, since petitioner had not shown that the prosecutors themselves feared an acquittal absent their misconduct. (A9, A11). Focusing on what was actually in the "minds" of the prosecutors, the court deemed irrelevant *Wallach I*'s conclusion that "had the jury been aware of [the] perjury it probably would have acquitted the defendants." (A10). It also refused to order an evidentiary hearing to determine what was in the prosecutors' "minds."

Petitioner's retrial is now scheduled to commence on March 15, 1993. The Second Circuit denied his motion to stay the mandate pending this Court's consideration of the instant petition on February 8, 1993.

REASONS FOR GRANTING THE WRIT

This petition raises three important legal issues: (i) the proper construction of a major federal criminal statute, as to which there is now a circuit conflict; (ii) the constitutionality of placing the burden upon the defendant of disproving an element of the offense defined by that same statute; and (iii) the method of proving a double jeopardy claim, which the court below decided in conflict with a decision of this Court.

I.

A. The Second Circuit's Holding that Property Is "Taken by Fraud" Under Section 2314 Even if No One Is Deceived Creates a Conflict Among the Circuits.

Wallach I held that obtaining payment for services rendered to a corporation violates Section 2314 if there is a misstatement or omission in a bill or invoice, even if no director or officer is deceived. 935 F.2d at 468-69. *Wallach II* extends *Wallach I* by absolving the government from proving that anyone, even a single shareholder, "was misled by the false representations" to sustain a conviction. (A14).

Section 2314 expressly prohibits the interstate transportation of property of the value of $5,000 or more that the defendant knows "to have been stolen, converted or taken by fraud." Thus, property cannot be taken by fraud if an inaccurate letter or invoice is submitted at a customer's request and those who lawfully make the payment are fully aware of, and requested, the services being rendered.

The government must prove that someone was misled to convict under Section 2314. Under the Second Circuit's construction of the statute, a person may be convicted because the person drove someone else's car across a state line even if there is no proof that they did so without the owner's consent.

The Second Circuit has created a conflict among the circuits on the proper construction of a major criminal statute. Both the Fourth and Sixth Circuits require the government to demonstrate that the corporation, through its directors, officers or shareholders, did not consent to the payment of funds when a transaction is misbilled to convict under Section 2314. When property is alleged to have been

"taken by fraud," there must be evidence that someone was misled. There was no such evidence in this case.

In *United States* v. *Burbank*, 848 F.2d 453 (4th Cir. 1988), the defendant was convicted under Section 2314 for drawing checks on the company's accounts that were payable to a fictitious company. The Fourth Circuit reversed his conviction because the directors, officers and shareholders had consented to the purportedly stolen payments: "No evidence was presented by the government to show that the transactions were not authorized by the corporation." *Id.* at 454. Contrary to the Second Circuit's approach, this was not a "matter of defense," but rather the decision rested on "the government['s] . . . fail[ure] to prove that the property . . . was stolen, converted or taken . . . by fraud." *Id.* at 457.

In *United States* v. *Gullett*, 713 F.2d 1203 (6th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984), the Sixth Circuit upheld the Section 2314 convictions of two accountants for various schemes involving the looting of assets of several of their corporate clients. The court emphasized that, although some of the officers of the client companies were implicated, the companies themselves were deceived by a "parade of phony invoices and fictitious payees which were created in order to deceive *uninvolved* corporate officers and shareholders." *Id.* at 1210 (emphasis added).[3] Thus, the Sixth

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[3] In one instance, the Sixth Circuit stated that one of the accountants "concealed" several of the checks from the company's *majority* shareholder, who, unlike the public shareholders of Wedtech, had the legal authority to stop the payments. 713 F.2d at 1210. The court expressly noted that "the principal stockholder would not have consented to these payments had he known the truth." *Id.* In another case, the president of one of the companies "was deceived into signing the checks" by the "phony" invoices. *Id.* The court stated that "[h]ad [the president] known the invoices were false, he would not have signed the checks." *Id.*

Circuit made clear that the false documentation alone did not establish a fraud, but rather, the fact that "*[i]n reliance* on these false statements, the corporation made the payments." *Id.* at 1211 (emphasis added). Under those circumstances, "the basic elements of fraud—misrepresentation and *detrimental reliance*—[were] present." *Id.* (emphasis added). *See also United States* v. *Brandon*, 651 F. Supp. 323 (W.D. Va. 1987) (same).

Burbank and *Gullett* are consistent with the fundamental principle of this Court's decision in *Virginia Bankshares Inc.* v. *Sandberg*, 111 S. Ct. 2749 (1991). There, the Court ruled that minority shareholders did not have a private right of action to sue for false statements made by the directors in connection with a merger. The Court held the false statements could not have caused any damages, because the minority shareholders did not have the power to stop the merger under state law. *Id.* at 2765-66. This reasoning controls here.

Minority shareholders are not entitled by virtue of their stock ownership to control the ordinary payment of legal fees under New York law. *See Wallach I*, 935 F.2d at 462, 468. Thus, if a majority of Wedtech's shareholders requested that petitioner perform certain services and then submit letters misdescribing those services, there can be no claim that minority shareholders somehow lost any "right to control" the making of the payments. The funds cannot have been obtained by false representations if the majority shareholders requested the services and the minority shareholders had no power to stop the payments.[4]

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[4] The Second Circuit has created a second conflict by its statement that proof of "a scheme to use corporate assets improperly" can support a conviction under Section 2314. *See* (continued...)

This case is an appropriate vehicle for the Court to resolve the conflict among the circuits by deciding whether the government must prove that *at least one* director, officer or shareholder of a company was misled into parting with property to sustain a conviction under Section 2314. There is no dispute that the government did not introduce such evidence at petitioner's trial. *See* A14; 935 F.2d at 468-69.

B. The Second Circuit's Conversion of Section 2314 Into a Corporate False Statement Act Raises an Important Federal Question.

In the Second Circuit, the home of many of America's leading corporations, the government has been granted an unlimited and dangerous license to prosecute anyone who submits to a corporation or partnership an invoice or letter relating to a payment that may be characterized as false or

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[4](...continued)
Wallach I, 935 F.2d at 468. Section 2314 is not a statute intended to prevent willing entities—corporate or human—from breaking the law through the manipulation of their own assets. The Eighth and Tenth Circuits have rejected the notion that the improper use of assets by the owner can render property "stolen, converted or taken by fraud." Thus, in *United States* v. *Rogers*, 786 F.2d 1000 (10th Cir. 1986), the Tenth Circuit held that a violation of customs regulations did not turn a consensual property transfer into a theft under Section 2314. Similarly, in *United States* v. *Carman*, 577 F.2d 556 (9th Cir. 1978), the Ninth Circuit refused to "construe" Section 2314 "so as to make criminal" the "fraudulent concealment" of assets from general creditors, who since the company was facing bankruptcy, were effectively its owners. *Id.* at 565. The court emphasized that Section 2314 did not reach "this form of commercial dishonesty," and that the statute did not "embrace every fraudulent scheme which, however remotely, diminishes another's wealth." *Id.*

incomplete. While Section 2314 requires proof that property was "stolen, converted or taken by fraud," the Second Circuit has held that the government need not show that the invoice or letter deceived any director, officer, or shareholder or that the defendant received payment without rendering a fair and agreed upon return. The government need only show that the papers documenting the transaction contained an error or omission.

Thus, according to Circuit Judge Ralph Winter, the Second Circuit in the *Wallach* cases has now "acceded to the desire of prosecutors for the creation of amorphous crimes that would allow prosecutors to pursue hard-to-define improprieties—or conduct that was improper only in the eyes of the particular prosecutor—or to pressure individuals thought to possess knowledge of other criminal activities." Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, The Oliver Wendell Holmes Lecture, Harvard Law School at 13-14 (October 13, 1992) (to be published in the Duke Law Journal).

The Second Circuit's conversion of Section 2314 into a corporate false statement statute akin to 18 U.S.C. § 1001 (false statements to government) has profound implications. Lawyers working for corporations on mergers, criminal investigations and other sensitive matters often do so under conditions of secrecy; only selected officers and directors, and few if any shareholders, may be privy to the details of the services being provided. Bills are sometimes purposefully drafted to maintain such secrecy. Sometimes a client will ask that the services be billed to an account other than the one that seems most relevant. Then, a simple "for-services-rendered" fee statement might become criminal. Moreover, mere negligence in billing, such as omitting some of the work done or goods provided, appears now to be a felony. The new rule, of course, applies not only to lawyers but to

anyone who provides goods or services to another, be that a corporation or a partnership.

Thus, the Second Circuit has placed outsiders such as petitioner in the untenable position of being unable to rely upon the basic principle of corporate law (and agency law as well) that directors and officers have the authority to act on behalf of the corporation. No longer can an outsider agree to provide goods or services to a corporation at the request of the directors and officers and later to send a bill that meets their specifications. The decision below exposes all involved in such arrangements to federal felony convictions, since property is being obtained by "misbilling" the corporation.

This Court has expressed its concern with any construction of a criminal statute that "would make a surprisingly broad range of unremarkable conduct a violation of federal law." *Williams* v. *United States*, 458 U.S. 279, 286 (1982). *See also Liparota* v. *United States*, 471 U.S. 419, 426 (1985) ("to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct"). Thus, *Williams* rejects a construction of a bank fraud statute that technically criminalized any willful bouncing of a check. Because that statute, like Section 2314, did not require proof of a fraudulent scheme, any "presentation of one false statement [in the form of a bounced check]," *id.*, would have been criminal. The Court rejected the idea that "Congress really set out to enact a national bad check law." *Id.* at 287.

The Second Circuit's crafting of a corporate false statement law is not only unjustified, it is unnecessary to protect investors. As Judge Winter has said, in criticizing the *Wallach* decisions, shareholders "most decidedly have no desire to rummage through a lawyer's bills," and the notion that this body of law is needed to protect them is a "fiction." Winter, Holmes Lecture, *supra*, at 13. Shareholders are

already well protected by comprehensive state and federal regulatory schemes governing the conduct of corporate affairs, including fiduciary obligations, the doctrine of waste, the regulation of accounting practices, and the mandated disclosure of material information. Indeed, far from adhering to this Court's recognition of "the premise of § 2314—the need to fill with federal action an enforcement chasm created by limited state jurisdiction," *Dowling* v. *United States*, 473 U.S. 207, 221 (1985), the *Wallach* decisions permit the kind of substantive regulation of corporate transactions—long the province of the states—that Congress has declined to enact. *See generally Santa Fe Indus.* v. *Green*, 430 U.S. 462, 478-79 (1977). It is particularly ironic that this new, court-created statute is applied to convict petitioner when it is conceded that, at the request of the directors and officers, he performed lawful services that justified his fees.

C. The Second Circuit Has Eliminated an Element of the Offense Prohibited by Section 2314 and Required Defendants to Disprove that Element in Violation of Due Process.

It is axiomatic that the government must prove every element of the crime beyond a reasonable doubt, *see In re Winship*, 397 U.S. 358, 361-68 (1970), but the decision below relieves the government of having to prove what has always been an element of Section 2314—an owner's detrimental reliance on false representations in connection with the parting of property. *See United States* v. *Burbank*, 848 F.2d at 454; *United States* v. *Gullett*, 713 F.2d at 1211.

The standard instruction defining "stolen" for purposes of Section 2314 contains as a key element the "taking from another without that person's consent." 2 Devitt, Blackmar & O'Malley, *Federal Jury Practice and Instructions* § 50.13 at 795 (1990); *accord Manual of Model Jury Instructions for*

the Ninth Circuit § 8.20 (1985 ed.). Thus, in the paradigmatic violation of Section 2314, the interstate transportation of a stolen automobile, the government must prove not only that the defendant transported the vehicle of another across state lines, but did so without the owner's consent.

The decision below, however, imposes on the defendant the impossible task of proving a negative—that not one director, officer, or shareholder was misled by a letter or invoice relating to billing for agreed-upon services. While recognizing that property obtained by false representations is not stolen if the owner knowingly consents to its transfer, *Wallach II* holds that proof "that all the shareholders consented to parting with the corporate property on the basis of the false representations, is a matter for the defense." (A14). But property cannot be taken by fraud if no one is shown to have been defrauded. The government can easily establish fraud if anyone was misled; it is impossible for defendants to show that no one, out of hundreds or thousands of persons, was misled or that every shareholder consented.

This Court has repeatedly held that a judicial instruction that shifts the burden of persuasion on an element of the crime to the defendant or that creates a rebuttable presumption on an element violates due process. *See Sandstrom* v. *Montana*, 442 U.S. 510 (1979); *Carella* v. *California*, 491 U.S. 263 (1989). The Second Circuit's shifting of the burden of proof is particularly unfair because it requires a defendant to produce every shareholder of a public company to testify whenever a transaction, approved by the directors and officers, is misbilled—an impossible task. This is a clear violation of due process.

Finally, the Second Circuit erred in holding that Section 2314 must be "broadly construed" to satisfy statements in the legislative history of "'Congress' general purpose to combat interstate fraud.'" *Wallach I*, 935 F.2d at 469 (quoting

Moskal v. *United States*, 111 S. Ct. 461, 467 (1990)). This Court has stated that "'general declarations of policy,' whether in the text or in the legislative history, will not support construction of an ambiguous criminal statute against the defendant." *United States* v. *R.L.C.*, 112 S. Ct. 1329, 1338 n.6 (1992) (plurality opinion) (quoting *Hughey* v. *United States*, 495 U.S. 411, 422 (1990)).[5] A fortiori, statements of "general purpose" in the legislative history cannot remove an element of the crime set out in a statute's text.

II.
The Second Circuit Has Imposed An Impossible Burden for Defendants Raising Double Jeopardy Claims Based on Prosecutorial Misconduct.

This Court in *Oregon* v. *Kennedy*, 456 U.S. 667, 676 (1982), held that a defendant may not be retried if prosecutors engage in conduct "intend[ed] . . . to subvert the protections afforded by the Double Jeopardy Clause." The Second Circuit agreed that *Kennedy* covers the situation "where a prosecutor apprehends an acquittal and, instead of provoking a mistrial, avoids the acquittal by an act of deliberate misconduct." (A9). But, at the same time, the Second Circuit imposed an impossible burden for petitioner to satisfy to prove such a claim.

Petitioner's double jeopardy motion rested on a demonstration that the prosecutors here knew that their key witness

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[5] This case provides an opportunity to consider an issue left unresolved in *R.L.C.*, where the Court debated whether legislative history may ever be used to "cure" an ambiguity on the face of a criminal statute. *Compare* 112 S. Ct. at 1338 n.6 *with id.* at 1339-41 (Scalia, J. concurring) and *id.* at 1341-42 (Thomas, J. concurring).

was perjuring himself and that they let him do so to avoid an acquittal. No other conclusion is possible on the undisputed facts of record. Indeed, so obvious was this conclusion that the *Wallach I* panel held "as a matter of law that had the jury been aware of [the] perjury it probably would have acquitted [petitioner]." 935 F.2d at 457-58. *Wallach II* ignored this holding, instead requiring petitioner to show that this fear of an acquittal was "in the mind of the prosecutors," and that they "had actual knowledge" of the perjury. (A10). By requiring proof of the prosecutors' subjective state of mind, the *Wallach II* panel imposed a burden that could be met only if the prosecutors confessed their misconduct and state of mind.

The Second Circuit's focus on the prosecutors' "subjective intent" was contrary to *Kennedy*. There, this Court said that courts should "[i]nfer[] the existence or nonexistence of intent [to provoke a mistrial] from objective facts and circumstances." 456 U.S. at 675. Justice Powell, the fifth vote, emphasized that "[b]ecause 'subjective' intent often may be unknowable, . . . a court—in considering a double jeopardy motion—should rely primarily upon the objective facts and circumstances of the particular case." *Id.* at 679-80 (Powell, J., concurring).

The objective facts here are probably the strongest showing that will ever be made—short of an outright confession—that prosecutors intended to engage in misconduct to avoid an acquittal. At petitioner's first trial, the government's "centerpiece" witness, Anthony Guariglia, testified on direct examination that at the government's insistence he had stopped his compulsive gambling in the

summer of 1988. (JA 169-73).[6] Guariglia's testimony regarding his addiction had only one purpose: to demonstrate that he had undergone a "moral transformation," thus strengthening his critical testimony against petitioner. In closing argument, the government repeatedly told that jury that they could believe Guariglia, because if he perjured himself in any respect, the leniency agreement was off, and he would be prosecuted for all his crimes.

In this case, the objective facts are clear and cannot be disputed. On cross-examination, petitioner's counsel confronted Guariglia with evidence that he had signed markers (I.O.U.'s) to purchase a total of $65,000 in gambling chips on two occasions in the fall of 1988 at the Tropicana Casino in Atlantic City. (JA 176-79). Guariglia tried to explain his purchase of the chips by testifying that he had not gambled but had used them to pay off his previous markers at the Tropicana. (JA 177). That explanation was preposterous, since casinos do not permit people to pay off gambling I.O.U.'s with more I.O.U.'s.

After this cross-examination, the lead prosecutor learned from a Tropicana employee that Guariglia's story of swapping old markers for new ones was in fact false. (JA Exhibit G at 176-77). When the prosecutor raised this perjury with Guariglia in preparing redirect, Guariglia changed his story completely. Now he said that he had not paid off old markers with new ones, but instead on the first occasion, in September 1988, had converted the markers to cash without gambling. (JA Exhibit G at 177). On the second occasion, in October 1988, Guariglia said that he had given the chips to

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[6] Citations in the form "JA" are to the Joint Appendix filed in the Second Circuit. Petitioner has filed a copy of the Joint Appendix with this Court for ease of reference.

his friend, Marshall Koplitz, to repay an outstanding debt. (JA 191; JA Exhibit G at 177).

Guariglia also told the lead prosecutor in private that he had in fact played cards at the Tropicana: "I may have played Koplitz's hand, but it was Koplitz's money, after I gave it to him. He was the one who gambled." (JA Exhibit G at 178). This critical fact was not disclosed at petitioner's trial, although the prosecutors knew it then, but was disclosed only in *February 1991*, while petitioner's first appeal was pending, when the prosecutor testified at Guariglia's perjury trial. It is clear that petitioner's first jury should have been informed that a man who denied gambling now told the prosecutors that he played cards at the Tropicana. The jury should have been allowed to decide for itself whether to believe his new story and, if it did, whether it accepted Guariglia's (and the government's) definition of what constituted gambling.

But matters got worse. Petitioner's counsel showed the prosecutors gambling records ("rating slips") prepared by Tropicana employees demonstrating that Guariglia, on both the days in question, had in fact gambled at different tables, at different times, and was identified in writing by a number of different casino personnel. *Wallach I* described these gambling records, which were not admitted into evidence at the government's behest, as "powerful evidence that Guariglia was lying." 935 F.2d at 457.

Petitioner offered these business records as evidence and offered a Tropicana witness to authenticate the records. At the government's request, the trial court excluded both the records and the testimony that proved Guariglia's perjury. But the prosecutors now knew the truth: their "centerpiece" witness had lied on direct, on cross, on redirect, and on recross. And they let him do so. Worse than that, knowing what they did, the prosecutors repeatedly vouched for Guariglia's credibility in closing argument.

If these facts do not compel a conclusion that the prosecution sponsored perjury to avoid an acquittal, and that petitioner is entitled to a double jeopardy bar, no facts will ever suffice, and defendants have lost the protection that is afforded by the Double Jeopardy Clause.

Wallach II did not take any of this into account. The Second Circuit ignored (i) Guariglia's history of compulsive gambling, (ii) his false testimony on cross-examination about using new markers to pay off old debts, (iii) his admission to the lead prosecutor during preparation for redirect that he had played cards in Atlantic City, (iv) his concocted story about giving chips to a friend to pay off a second debt, (v) the gambling records and witness kept from petitioner's jury at the government's behest that proved Guariglia lied on direct, cross, redirect, and recross, and (vi) that the prosecutors, knowing this, allowed the testimony to stand and vouched for Guariglia's truthfulness in the closing argument. This was enough to compel a conclusion that they knowingly sponsored perjured testimony to avoid an acquittal.

Even assuming, contrary to *Kennedy*, that the Second Circuit was correct in applying a purely subjective standard, it nevertheless erred by refusing to order an evidentiary hearing at which the prosecutors' intent could have been tested. Such a hearing was necessary here because the *Wallach I* panel "fear[ed]" that "given the importance of [Guariglia's] testimony to the case, the prosecutors may have consciously avoided recognizing the obvious—that is, that [he] was not telling the truth." 935 F.2d at 457. Petitioner plainly should have been given an opportunity to test the validity of that fear. He was denied it because the *Wallach II* panel held that petitioner had not proved the prosecution's subjective intent.

The legal question for this Court is whether, under *Kennedy*, the courts are to apply a subjective or an objective

test in determining prosecutorial misconduct and the reason for it.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

ROBERT H. BORK
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 862-5852

Counsel for Petitioner

ROBERT J. GIUFFRA, JR.
125 Broad Street
New York, New York 10004

ROBERT A. CULP
334 East 55th Street
New York, New York 10022

DENNIS P. RIORDAN
RIORDAN & ROSENTHAL
523 Octavia Street
San Francisco, CA 94102

Of Counsel

March 2, 1993

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 176 — August Term, 1992
(Argued: August 31, 1992 Decided: Nov. 9, 1992)
Docket No. 92—1221

UNITED STATES OF AMERICA,

Appellee,

— against —

EUGENE ROBERT WALLACH,

Defendant-Appellant.

Before:

FEINBERG, NEWMAN, and CARDAMONE,

Circuit Judges.

Interlocutory appeal from the March 31, 1992, order of the United States District Court for the Southern District of New York (Richard Owen, Judge) denying defendant's motion to dismiss, on double jeopardy grounds, charges arising out of the affairs of the Wedtech Corporation.

Affirmed.

ROBERT H. BORK, Washington, D.C. (Dennis P. Riordan, Riordan & Rosenthal, San Francisco, California, and Robert J. Guiffra, Jr., New York, New York, on the brief), *for Defendant-Appellant*.

BARUCH WEISS, Asst. U.S. Atty., New York, New York (Otto G. Obermaier, U.S. Atty., Elliott B. Jacobson, Jeffrey B. Sklaroff, Andrew C. McCarthy, Asst. U.S. Attys., New York, New York, on the brief), *for appellee*.

JON O. NEWMAN, *Circuit Judge*:

This interlocutory appeal presents a double jeopardy objection to retrial of a criminal case in the aftermath of this Court's reversal of a conviction on the ground that the prosecution should have known that a Government witness's trial testimony was false. *See United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991) ("*Wallach I*"). Eugene Robert Wallach appeals from the March 31, 1992, order of the District Court for the Southern District of New York (Richard Owen, Judge) denying his motion to dismiss charges arising out of the affairs of the Wedtech Corporation. He raises a double jeopardy claim and renews some challenges to the sufficiency of the evidence and some related claims not

adjudicated on the prior appeal. We reject all of the current and renewed contentions that are alleged to bar retrial and affirm.

Background

After a four month jury trial in 1989, Wallach was convicted on four counts: conducting the affairs of Wedtech through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c) (1988), two counts of defrauding Wedtech of funds ($125,000 and $300,000) subsequently transported in interstate commerce, in violation of 18 U.S.C. § 2314 (1988), and conspiracy to violate the federal conflict of interest statute, 18 U.S.C. § 203 (1988), and to defraud the United States, in violation of 18 U.S.C. § 371 (1988). Wallach's two co-defendants were also convicted. Wallach's sentence included a six year prison term. The details of the offenses are fully set forth in *Wallach I*, and the background of the broader Wedtech violations is set forth in *United States v. Biaggi*, 909 F.2d 662, 670-75 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1102 (1991).

At trial, significant testimony adverse to Wallach was given by Anthony Guariglia, formerly a senior officer of Wedtech. In the course of his direct testimony, Guariglia testified that he had stopped his compulsive gambling in the summer of 1988 and had not gambled in the interval from that time to the time of the trial in June 1989. On cross-examination, Guariglia admitted that he had signed gambling markers totaling $65,000 at the Tropicana, an Atlantic City casino, in September and October of 1988. On redirect examination, he repeated his denial of any gambling since the summer of 1988 and endeavored to explain the two episodes concerning his signing of markers. With regard to $15,000 of markers drawn in September, he claimed that he had drawn the markers and cashed in the chips to pay off previous

markers that he believed he owed and then had put the cash in his pocket when he learned that no markers were outstanding. With regard to $50,000 of markers drawn in October, he claimed that he had obtained $50,000 worth of chips and had given them to a friend, Marshall Koplitz. Prior to eliciting Guariglia's redirect testimony, the Government interviewed Koplitz and another person, both of whom corroborated Guariglia's explanations.

After Wallach's conviction, the Government obtained evidence, independent of the Tropicana markers, that Guariglia had gambled in Puerto Rico in November 1988. The Government subsequently indicted and convicted Guariglia of perjury based on his false denial of gambling during the *Wallach* trial. *See United States v. Guariglia*, 962 F.2d 160 (2d Cir. 1992). The revelations of Guariglia's Puerto Rico gambling precipitated a new trial motion by Wallach and his co-defendants. Judge Owen denied the motion, ruling that there was no evidence that the Government was aware of Guariglia's perjury at the time of Wallach's trial.

This Court reversed the conviction of Wallach and his co-defendants on the ground that the Government "should have known" that Guariglia was committing perjury in claiming to have ceased gambling. *Wallach I*, 935 F.2d at 457. Focusing only on the Tropicana markers, we expressed a "fear" that "the prosecutors *may* have consciously avoided recognizing the obvious — that is, that Guariglia was not telling the truth." *Id.* (emphasis added). We reversed, applying the standard that where the prosecution "knew or should have known of the perjury," the conviction must be set aside "'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Id.* at 456 (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)). Alternatively, we ruled that even if the Government

had no knowledge of the perjury, reversal was warranted under the standard that where the Government is unaware of a witness's perjury, the conviction must be set aside "if the testimony was material and 'the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted.'" *Id.* (quoting *Sanders v. Sullivan*, 863 F.2d 218, 226 (2d Cir. 1988)). From the opinion in *Wallach I*, it is evident that the prior panel was not applying the *Sanders* "but for" test in its traditional sense of meaning that, without the false testimony, a conviction would most likely not have resulted. Guariglia's denial of gambling did not implicate Wallach at all, and had he never denied his prior gambling, it is highly unlikely that his gambling, as distinguished from his false testimony denying it, would have had any effect on the jury's consideration of Wallach's guilt. The prior panel's point was that a jury, aware of the falsity of Guariglia's sworn denial of gambling, would likely have disbelieved his accusations against Wallach, and disbelief of those allegations would likely have left the jury with other evidence unlikely to have persuaded it beyond a reasonable doubt of Wallach's guilt. As the Court said, "[H]ad the jury been aware of Guariglia's perjury it probably would have acquitted the defendants." *Wallach I*, 935 F.2d at 458.

After the convictions were reversed, the Government agreed to a dismissal of the RICO counts against Wallach and his co-defendants. The two co-defendants each pled guilty to one of the charges remaining against them. Wallach, facing retrial on the two stolen property counts and the count charging conspiracy to violate the conflict of interest statute, moved to dismiss these charges on double jeopardy grounds. Judge Owen denied the motion as "frivolous." This appeal followed.

Discussion

Both sides spend considerable portions of their papers jousting over whether the double jeopardy objection to Wallach's retrial is available for our consideration. Rather than grapple with all of the contentions concerning the significance, if any, of (a) Wallach's failure to move for a mistrial after Guariglia's testimony, (b) his failure to assert the double jeopardy objection on the prior appeal, (c) this Court's mandate directing a new trial, and (d) Wallach's failure to seek further review of this Court's prior decision, we prefer to assume, for purposes of this appeal, that the double jeopardy objection is properly before us and resolve the issue on its merits.

I. Does double jeopardy protection bar retrial because of prosecution misconduct?

Both sides recognize that a defendant who secures a reversal of his conviction because of a defect in the proceedings leading to conviction normally obtains from the Double Jeopardy Clause no insulation against retrial. *See Burks v. United States*, 437 U.S. 1, 14-16 (1978). The principal exception is a reversal for insufficiency of the evidence. *Id.* at 16-17. Both sides also recognize that a further exception arises in some circumstances involving misconduct by a prosecutor, but they differ sharply on the scope of that further exception. Their differences arise from disagreement as to the teaching of *Oregon v. Kennedy*, 456 U.S. 667 (1982).

Kennedy concerned a state court criminal trial that ended when a defendant's motion for a mistrial was granted. The defendant sought the mistrial after the prosecutor had asked a witness a prejudicially improper question. The trial court then denied a motion to preclude retrial on double jeopardy grounds, after finding that the prosecutor had not intended to

precipitate the mistrial. The state appellate court reversed, concluding that retrial was barred, regardless of the prosecutor's intent, simply because the prosecutor's misconduct constituted "overreaching." *See id.* at 670.

Reviewing this ruling, the Supreme Court acknowledged that its prior decisions had created some ambiguity as to the standard to be applied in assessing a prosecutor's misconduct for purposes of determining whether, under the Double Jeopardy Clause, a mistrial precipitated by such misconduct precluded a retrial. *See id.* at 677-79. Resolving the ambiguity, the Court rejected the idea that misconduct alone barred a retrial and ruled instead that the circumstances in which the Clause would bar a retrial "are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Id.* at 679; *accord United States v. Dinitz*, 424 U.S. 600, 611 (1976).

The Government reads *Kennedy* as limited to its context of a criminal trial that ends with the granting of a defendant's motion for a mistrial. In the Government's view, *Kennedy* affords Wallach no benefit because he did not even move for a mistrial, much less obtain one; indeed, the trial ended, not with a mistrial, but with a conviction. On the other hand, Wallach reads *Kennedy* without the limitation of the mistrial context and extracts from it a rule of more general application: "The Supreme Court's rationale is that the Double Jeopardy Clause bars a second prosecution when the prosecutor engages in serious misconduct with the intention of preventing an acquittal." Brief for Appellant at 15.

We have some doubt that the Supreme Court expected its carefully worded statement of the rule in *Kennedy* to be extended beyond the context of a trial that ends with the granting of a defendant's motion for a mistrial. *See Kennedy*,

456 U.S. at 676 (stating, in dictum, that the Double Jeopardy Clause does not bar retrial of defendant whose conviction is reversed on appeal on the same grounds as those sought in an unsuccessful mistrial motion). The decision proceeds from the premise that "the Double Jeopardy Clause affords a criminal defendant a 'valued right to have his trial completed by a particular tribunal.'" *Id.* at 671-72 (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)). Obviously a defendant, like Wallach, whose trial ends with a conviction has suffered no impairment of that valued right.

Yet there is force to Wallach's argument for some sort of extension. Since *Kennedy* bars a retrial on jeopardy grounds where the prosecutor engages in misconduct for the purpose of goading the defendant into making a successful mistrial motion that denies the defendant the opportunity to win an acquittal, the Supreme Court might think that the Double Jeopardy Clause protects a defendant from retrial in some other circumstances where prosecutorial misconduct is undertaken with the intention of denying the defendant an opportunity to win an acquittal.

But an extension of *Kennedy* beyond the mistrial context cannot be as broad as the rule for which Wallach contends. Every action of a prosecutor in the course of a trial is taken "with the intention of preventing an acquittal." *See Kennedy*, 456 U.S. at 674 ("Every act on the part of a rational prosecutor during a trial is designed to 'prejudice' the defendant by placing before the judge or jury evidence leading to a finding of his guilt."). If the rationale of *Kennedy* were as broad as claimed by Wallach, the Double Jeopardy Clause would bar retrial of every defendant whose conviction is reversed because of intentional misconduct on the part of a prosecutor. For example, knowing use of perjured testimony that "could have affected the judgment of the jury" would result not only in reversal of a conviction,

see United States v. Agurs, 427 U.S. at 103; *Napue v. Illinois*, 360 U.S. 264, 272 (1959), but also in a bar to retrial on jeopardy grounds. The Supreme Court could not possibly have mandated that result in *Kennedy*. Such a result would obliterate the precise distinction drawn in *Kennedy* between misconduct that merely results in a mistrial and misconduct undertaken for the specific purpose of provoking a mistrial. Only the latter circumstance creates a bar to retrial.

If any extension of *Kennedy* beyond the mistrial context is warranted, it would be a bar to retrial only where the misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct. If jeopardy bars a retrial where a prosecutor commits an act of misconduct with the intention of provoking a mistrial motion of the defendant, there is a plausible argument that the same result should obtain where he does so with the intent to avoid an acquittal he then believes is likely. The prosecutor who acts with the intention of goading the defendant into making a mistrial motion presumably does so because he believes that completion of the trial will likely result in an acquittal. That aspect of the *Kennedy* rationale suggests precluding retrial where a prosecutor apprehends an acquittal and, instead of provoking a mistrial, avoids the acquittal by an act of deliberate misconduct. Indeed, if *Kennedy* is not extended to this limited degree, a prosecutor apprehending an acquittal encounters the jeopardy bar to retrial when he engages in misconduct of sufficient visibility to precipitate a mistrial motion, but not when he fends off the anticipated acquittal by misconduct of which the defendant is unaware until after the verdict. There is no justification for that distinction.

Applying this limited extension of *Kennedy* to Wallach's case, however, avails him nothing. In the first place, it is

entirely unrealistic to think that the prosecution at Wallach's trial apprehended an acquittal. The evidence against Wallach and his co-defendants was quite strong. The prosecution had every reason to anticipate a conviction. Though not explicitly shouldering a burden to persuade us that the prosecution apprehended an acquittal, Wallach relies on the prior panel's conclusion that "had the jury been aware of Guariglia's perjury it probably would have acquitted the defendants." *Wallach I*, 935 F.2d at 458. We are entirely confident that this conclusion, reached by the prior panel after careful consideration of the entire record in the course of appellate review, indeed only after further consideration following an initial decision, *see United States v. Wallach*, No. 89-1544 (2d Cir. Aug. 13, 1991) (Order amending opinion), was not in the mind of the prosecutors at any time during Wallach's trial, and would not have been in their minds, even if they had thought that Guariglia's denial of gambling was false.

Moreover, this is not a case involving deliberate misconduct that might, if an acquittal were apprehended, invoke a double jeopardy bar to retrial. The prosecutors certainly did not malevolently elicit Guariglia's initial contention that he had ceased gambling. That assertion added nothing to the proof against Wallach or his co-defendants. Wallach does not contend otherwise. Instead, his point is that once the cross-examination put in issue the credibility of Guariglia's assertion, the prosecutors must have known that Guariglia was lying, yet they permitted his assertion to stand and sought to rehabilitate their witness by eliciting from him false explanations for his activities at the Tropicana casino.

On the prior appeal, the panel concluded, at most, that the prosecutors "should have known" of Guariglia's perjury. *Wallach I*, 935 F.2d at 457. There was no determination that the prosecutors had actual knowledge. Even the suggestion of possible conscious avoidance of knowledge was advanced

most tentatively: "We *fear* that . . . the prosecutors *may have* consciously avoided recognizing . . . that Guariglia was not telling the truth." *Id.* (emphasis added). Moreover, in denying the defendants' motion for a new trial, made after disclosure of Guariglia's gambling in Puerto Rico, Judge Owen expressly found that there was no evidence that the prosecution had any knowledge of the perjury. *See also id.* at 473 (Altimari, J., concurring). Wallach strenuously invites us to make a contrary finding based on our own review of the record. Having reviewed the record, we conclude that Judge Owen's finding should not be disturbed.

Thus, the factual predicate for extending *Kennedy* to bar Wallach's retrial — deliberate prosecutorial misconduct undertaken to avoid an acquittal that the prosecutors believed was likely in the absence of their misconduct — is totally lacking.

II. Does double jeopardy protection bar retrial because of insufficiency of the evidence?

Appellant also contends that retrial is barred because the evidence at the first trial was insufficient to support guilty verdicts on the counts on which he now faces retrial. A reversal on the basis of insufficiency of evidence, like an acquittal, bars a retrial, *see Burks v. United States*, 437 U.S. at 16-17, and a reversal of a conviction on grounds other than sufficiency does not avoid the need to determine the sufficiency of the evidence before a retrial may occur, *see United States v. Bibbero*, 749 F.2d 581, 586 (9th Cir. 1984), *cert. denied*, 471 U.S. 1103 (1985).

In advancing his sufficiency challenge, Wallach makes two distinct and somewhat inconsistent arguments. Focusing on the case as a whole, he contends that the prior panel has already determined that the Government's evidence was insufficient by expressing the view that a jury, informed of

Guariglia's perjury about his gambling, would "probably" have acquitted the defendants. Then, focusing on each of the two statutory violations that remain for retrial, he contends that the prior panel did not consider sufficiency and invites us to do so.

The broad challenge may be readily rejected. The prior panel, in the second of its alternate holdings, concluded that even if the prosecution was unaware of Guariglia's perjury, the convictions must be reversed because a jury with such awareness would "probably" have acquitted. That is not a ruling that the evidence presented was insufficient to permit a rational jury to find guilty beyond a reasonable doubt. Instead, it is a prediction of what the jury would have done, based on the prior panel's assessment, not of the sufficiency of the evidence, but of the *weight* of all the evidence including assumed knowledge of Guariglia's perjury about his gambling. The prior panel expressed the view that Guariglia's perjury "interfered with the jury's ability to *weigh* his testimony." *Wallach I*, 935 F.2d at 473 (emphasis added). Wallach's first sufficiency challenge is without merit.

In considering the second sufficiency challenge, dealing with specific offenses, we are met with the parties' dispute as to whether this claim is available for our consideration on this appeal. The Government contends that the prior panel "implicitly" found the evidence sufficient, Brief for Appellee at 36, and Wallach contends that the prior panel "expressly declined" to consider the insufficiency claim, Brief for Appellant at 27. The dispute as to whether *Wallach I* adjudicated Wallach's particularized sufficiency claims arises in large part because of the oblique way in which the issues were raised on the prior appeal. No section of Wallach's brief on the prior appeal was succinctly headed, "The evidence was insufficient to support the jury's verdict." Instead, the brief mounted a series of challenges to the

theories under which the Government sought to apply 18 U.S.C. § 2314 and 18 U.S.C. § 203 to Wallach's conduct. That approach led the prior panel to say:

> Although our decision on the perjury issue is itself a sufficient basis for disposing of these appeals, the likelihood of a new trial suggests that we should also address some of the other arguments urged by the defendants. We limit our analysis to those issues that directly challenge the validity of the indictment or the legal viability of the government's theory underlying any of the charges.

Wallach I, 935 F.2d at 459.[1] Clearly, the prior panel did not "expressly" decline to consider sufficiency, and its rejection of the challenge to the Government's legal theories may well have constituted an "implicit" consideration of sufficiency. But we prefer not to subject the defendant to retrial without express consideration of the sufficiency challenges that he asserts were not disposed of on the prior appeal.

Section 2314 violation. Appellant's challenge to the sufficiency of the evidence to support conviction on Counts 3 and 4, charging violations of 18 U.S.C. § 2314, is that "no evidence had been introduced that at least one Wedtech shareholder had been deceived by the allegedly fraudulent letters he sent to Wedtech." Brief for Appellant at 28. The issue thus raised, like most of those tendered in the brief on the

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1 The prior panel also said, in a concluding remark:

> We have considered the other arguments advanced by the defendants but choose to address at this time only those that are likely to recur at a retrial.

Wallach I, 935 F.2d at 473.

first appeal, is not whether such evidence was presented, but whether it was required. We are satisfied that the prior panel implicitly concluded that such proof was not required, and we now so hold expressly.

The prior panel accepted Wallach's premise that section 2314 does not apply to property taken with the consent of the owner, *Wallach I*, 935 F.2d at 468 (citing *United States v. Bennett*, 665 F.2d 16, 22 (2d Cir. 1981)), but nonetheless rejected Wallach's "self-theft" contention on the ground that the obtaining of property from a corporation by means of false representations is "a fraud on the corporation and its shareholders," *id.*, notwithstanding knowledge by the officers and directors of the falsity. The crime is complete when the defendant transports in interstate commerce property worth more than $5,000 that the defendant knew was obtained by fraud. *Id.* at 466 (citing *Dowling v. United States*, 473 U.S. 207, 214 (1985)). Implicit in the prior opinion is the idea that the fraud upon the corporation is established by showing that the property was obtained by false representations made to the corporation and that any claim of "self-theft," *i.e.*, that all the shareholders consented to parting with the corporate property on the basis of the false representations, is a matter of defense. The Government was not required to present evidence from a shareholder that he was misled by the false representations.

Section 203 conspiracy violation. Wallach's sufficiency challenge to Count 5, charging a conspiracy to violate 18 U.S.C. § 203, is "(i) that the government had failed to prove an agreement between himself and the Wedtech officers that he would lobby while a full-time federal official, and (ii) that the government had failed to prove both that [former Attorney General] Edwin Meese could award defense contracts and [(iii)] that Wallach had agreed to lobby Meese regarding any particular category of contracts." Brief for

Appellant at 28. In considering these claims, we are burdened, as was the prior panel, with the oblique way they were presented on the prior appeal. In an effort to renew his sufficiency contentions with respect to Count 5, Wallach's current brief airily refers us to specific pages of his main and reply briefs on the prior appeal. Examining those pages, we find a blend of arguments that challenge whether section 203 applies to the conduct that Wallach was alleged to have agreed to, whether the jury was properly instructed, whether the indictment was sufficiently precise, and, sandwiched in among the preceding contentions, some casual references to lack of evidence. We will endeavor to assess the sufficiency contention, to the extent that we are able to extract it.

The claim that the evidence failed to show that Wallach agreed to lobby *while* a federal official is clearly unavailing. As the prior panel expressly stated,

> [The $300,000 payment was arranged] after Wallach informed Guariglia and Moreno that he anticipated receiving an appointment to a position in the United States Department of Justice under his friend, then-Attorney General Meese. Wallach had advised Guariglia and Moreno that he wished to continue to lobby for Wedtech's interests while a full-time government officer.

Wallach I, 935 F.2d at 452. The testimony of Guariglia and Moreno abundantly supported these facts.

What Wallach is really contending is not that the evidence did not permit a finding that he agreed to lobby while a federal official but that the jury should have been instructed that it could convict on Count 5 only if it found that lobbying while a federal official was an essential ingredient of his agreement with the Wedtech officials. Otherwise, he contends, the jury might convict him for the lawful activity of lobbying while remaining a private citizen. With

the conviction on Count 5 under the charge as given now reversed, and with this interlocutory appeal confined to double jeopardy and related sufficiency of evidence issues alleged to bar retrial, we decline to offer advice to the District Court as to how it should submit Count 5 to the jury upon retrial.

Wallach's second sufficiency challenge, as set forth on the prior appeal, is that the evidence failed to permit a finding that Meese "had a role in defense procurement." Brief for Appellant Wallach at 43, *Wallach I* (hereafter "*Wallach I* brief"). As a pure sufficiency challenge, this contention is unavailing. The evidence permitted the jury to find that, while serving as Counselor to the President, Meese had instructed his deputy to oversee Wedtech matters and had actively played a role in influencing the Secretary of Defense to award contracts to Wedtech. It was a reasonable inference that Meese would continue to assist Wedtech from his vantage point as Attorney General, a role that afforded him regular access to his fellow cabinet member, the Secretary of Defense.

But Wallach's challenge regarding Meese was not purely a sufficiency challenge. His contention was that "[t]he alleged conspiracy to secure defense contracts through the lobbying of Edwin Meese did not state [*sic*] a conspiracy to violate Section 203." *Wallach I* brief at 43. This argument sounds as if it is a contention that Count 5 fails to state an offense. The initial difficulty with the argument is that Count 5 is not restricted, as Wallach wants to read it, to a conspiracy to lobby Meese.[2] Count 5 charges a conspiracy in which

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2 At the prior trial, Wallach sought an instruction that would have limited the jury's consideration of Count 5 to the restricted (continued...)

Wallach would receive compensation "for services WALLACH was to render personally at a time when he was to be an officer and employee of the United States in the executive branch, in relation to . . . contracts . . . before a department . . ., namely, Wedtech's efforts to obtain federal Department of Defense manufacturing contracts." That count plainly states an offense. For example, it would permit conviction upon proof that Wallach had accepted compensation in return for his services, while a federal officer, in directly lobbying the Defense Department for Wedtech. The real issue that was raised concerning Meese is whether evidence that Wallach would lobby Meese to lobby the Defense Department suffices to establish a section 203 violation. Since the prior panel did not decide that issue,[3] we feel obliged to do so.

Section 203(a), as it read at the time of Wallach's offense, punishes receipt of compensation, while a federal officer, "for *any services* rendered or to be rendered either by himself or another . . . *in relation to* any . . . contract . . . in which the United States is a party . . . before

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2(...continued)

version that he contended on appeal failed to state an offense. One of his proposed instructions would have required the jury to find that the services for which Wallach received compensation "would be in relation to particular matters *before Mr. Meese* in his capacity as Attorney General in connection with Wedtech efforts to procure defense contracts." Joint Appendix at 406, *Wallach I* (emphasis added). This request was refused.

3 The prior panel stated explicitly, regarding the challenge to Count 5, "We limit our discussion to Wallach's legal argument that only those individuals who actually become federal officials can be charged with conspiring to violate Section 203." *Wallach I*, 935 F.2d at 469.

any department. . . ." 18 U.S.C. § 203(a) (emphasis added.[4] We ruled in *United States v. Myers*, 692 F.2d 823, 853-58 (2d Cir. 1982), *cert. denied*, 461 U.S. 961 (1983), that the proscribed services must be rendered before the federal forum in question, declining the Government's invitation to read the statute more broadly to cover the mere rendering of advice as to matters pending before federal agencies. But neither *Myers* nor any other decision of which we are aware requires that the compensated services of a federal official must involve his direct rendering of service before the department where the matter is pending. We are confident that Congress wished to punish a federal official who accepts compensation not only for services rendered directly before the department where a contract decision is pending but also for services rendered indirectly through another federal official. The statute explicitly applies to services to be rendered "either by himself or another." While the latter term most precisely covers the situation where an officer sends an emissary to inform the agency of the officer's own interest in the matter, it lends considerable support to our construction that the statute as a whole also applies to a two-step arrangement in which an officer, for compensation, personally influences another officer to influence the department before which a contract is pending. Since it was reasonably foreseeable that Meese, as Attorney General, would endeavor to influence the Department of Defense on behalf of Wedtech, Wallach's acceptance of compensation, to act, after Wallach became a federal official, to influence Meese to do so, is punishable under section 203(a).

Wallach's third challenge to Count 5 requires little discussion. As alleged on the prior appeal, his point is that "the

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4 The current version is limited to "any representational services." 18 U.S.C. § 203(a) (Supp. II, 1990).

government plainly failed to identify the category of government contracts with sufficient particularity." *Wallach I* brief at 45. This is not a sufficiency challenge, but, like the previous claim, it is a legal objection not adjudicated on the prior appeal. In any event, it is unavailing.

Section 203(a) requires that the compensated services be rendered in relation to a "particular matter." *See United States v. Williams*, 705 F.2d 603, 622 (2d Cir.), *cert. denied*, 464 U.S. 1007 (1983). We made clear in *Williams*, however, that section 203(a) does not require "pleading or proof of a single contract identified by contract number or similar individualized detail. It is sufficient if the compensation has been received for services to be rendered with respect to a particular category of contracts." *Id.* The indictment focused on manufacturing contracts from the Department of Defense to Wedtech. Though the scope of the contracts was not quite as narrow as the "contracts for the purchase of titanium" involved in *Williams*, *id.*, it easily satisfied the particularity requirement of section 203(a).

We thus conclude that all of Wallach's "sufficiency" challenges and the related legal challenges to Count 5 are without merit.

Conclusion

We conclude that the Double Jeopardy Clause does not bar a retrial on the pending charges. The order of the District Court is affirmed. The pending petitions for mandamus, seeking recusal of the District Judge and disqualification of the prosecutors, are denied.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of January one thousand nine hundred and ninety-three.

UNITED STATES OF AMERICA,
Appellee,

v

DOCKET NUMBER
92-1221

EUGENE ROBERT WALLACH,
Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by attorneys for Defendant-Appellant, Eugene Robert Wallach.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
ELAINE B. GOLDSMITH, Clerk
By:

/s/
Carolyn Clark Campbell
Chief Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES,

Plaintiff,

— against —

EUGENE ROBERT WALLACH,

Defendant.

S 87 Cr. 985 (RO)

OPINION
AND ORDER

APPEARANCES:

OTTO G. OBERMAIER
United States Attorney for the
Southern District of New York;
BARUCH WEISS
ELLIOT JACOBSON
Assistant United States Attorneys.

DENNIS RIORDAN
RIORDAN & ROSENTHAL
523 Octavia Street
San Francisco, CA 94102
-and-

ROBERT J. GIUFFRA, JR.,
125 Broad Street
New York, NY 10004
-and-

ELLEN YAROSHEFSKY
72 Spring Street
New York, NY 10012
Attorneys for Defendant Wallach

ROBERT H. BORK
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
Of Counsel

OWEN, *District Judge*:

In the summer of 1989, I presided over a sixteen week trial, following which defendant Eugene Robert Wallach was convicted by the jury of various violations of federal criminal law arising out of his activities in connection with the Wedtech Corporation. That conviction was reversed on May 31, 1991 by the Court of Appeals for the Second Circuit and remanded for a new trial, *see United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991), familiarity with which is presumed. On remand to the District Court, and Wallach[1] coming before me again, Wallach now moves for three types of relief: a motion to recuse me from presiding over any retrial; a motion to disqualify Assistant United States Attorneys Baruch Weiss and Elliot Jacobson from representing the United States on any retrial; and a motion to dismiss the indictment in its entirety on grounds of double jeopardy. For the reasons stated below, each motion is denied.

I. Motion for Recusal

Wallach moves to have me recuse myself from any retrial. Recusal is within the Court's discretion. *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988), *cert. denied*, 490 U.S. 1102 (1989). Unless there is good reason to recuse, a district judge ought *not* to recuse himself. *In re Drexel Burnham*, 861 F.2d at 1312; *National Auto Brokers v. General Motors Corp.*, 572 F.2d 953, 958 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

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1 Defendants Rusty Kent London and Wayne Franklyn Chinn did not join in the present motions. Chinn pled guilty to one Count of this indictment on March 27, 1992.

Wallach bases his motion for recusal on 28 U.S.C. § 455(a) which provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Wallach made clear in his motion papers, and reasserted at oral argument, that this motion is based not on any reasonable question as to "personal bias or prejudice", pursuant to 28 U.S.C. § 144, but only on the *appearance* of impartiality in some unspecified quarters.[2] At oral argument defense counsel stated:

> We are not raising a claim of personal bias under 28 U.S.C. 144. I have not submitted an affidavit claiming that you, your Honor, are bias[ed] personally against my client. I could not make such a sworn claim, your Honor.

But the "objective standard" for recusal under section 455(a), can not be met by pointing to in-court rulings or pronouncements based on information the judge learned by presiding over the case. *In re International Business Machines Corp.*, 618 F.2d 923, 929-30 (2d Cir. 1980). "Prior adverse rulings 'without more, . . . do not provide a reasonable basis for questioning a judge's impartiality.'" *Schiff v. United States*, 919 F.2d 830, 834 (2d Cir. 1990) *cert. denied*, 111 S.Ct. 2871 (1991) (quoting *United States v. Wolfson*, 558 F.2d 59, 64 (2d Cir. 1977)). Since the basis of Wallach's assertion of the appearance of impartiality is solely rulings or statements this Court made during trial or

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2 During oral argument the following dialogue took place:

> THE COURT: . . . you say to some [the Sharansky ruling] may appear unfair but you do not contend it was in fact unfair?
>
> MR. RIORDAN: Right.

sentencing in response to matters adduced at trial, this argument fails.

Wallach also moves for recusal under *United States v. Robin*, 553 F.2d 8 (2d Cir. 1977). *Robin*, 553 F.2d at 10, sets forth the factors considered by the Court of Appeals on an application to remand to a different judge.[3]

> Absent proof of personal bias requiring recusation, Title 28 U.S.C. § 144, [which is not alleged herein] the principal factors considered by us in determining whether further proceedings should be conducted before a different judge are (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment

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3 Although Wallach incorrectly asserts that the common practice in the Southern District is for a retrial of a criminal case to be before a new judge, the actual practice is that "[a]s a general rule, cases sent back to a district court for further proceedings are remanded without any directions or suggestions as to the judge before whom they are to be conducted. That matter is properly left to the district court." *Robin*, 553 F.2d at 9. The Second Circuit in *Robin* further held that, "Upon remand for a retrial, an additional factor bearing upon whether to reassign to another judge is whether the retrial will be before the judge as a fact-finder or sitting with a jury . . . Where the judge sits as the fact-finder, reassignment is the preferable course, since it avoids any rub-off of earlier error. . . . No such problem is usually confronted upon retrial before a different jury." *Id.*, at 10.

would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

I note, initially, that the Court of Appeals, in its remand, made no suggestion that the retrial should be before a different judge. Nor were major views or findings at the trial determined to be erroneous or based on evidence that would have to be excluded on a new trial. Further, it is obvious that reassignment would entail an unjustifiable and unnecessary waste and duplication of judicial resources. I presided over this case for four years, gaining in-depth familiarity with its numerous, complex issues and I note that no other Judge of this Court could help but be aware of the outcome of Wallach's prior trial and sentence, and therefore there is no realistic possibility of Wallach going forward with a clean slate.

Finally, this motion is clearly untimely. Although Wallach moves pursuant to 28 U.S.C. § 455 which has no timeliness requirement — unlike 28 U.S.C. § 144[4] which requires that motions be filed in a timely manner — nevertheless, the timeliness requirement of section 144 has been read into section 455 and is applied with equal force to motions brought under this section. *Polizzi v. United States*, 926 F.2d 1311, 1321 (2d Cir. 1991); *Apple v. Jewish Hospital and Medical Center*, 829 F.2d 326, 333 (2d Cir. 1987); *In Re International Business Machines Corp.*, 618 F.2d at 932. Under both sections, a motion for recusal should be made "at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim." *Polizzi*, 926 F.2d at 1321, quoting *Apple*, 829 F.2d at 333.

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4 Section 144 requires that a party "make[] and file[] a timely and sufficient affidavit" to support a claim of personal bias.

As the basis for his motion, Wallach points only to facts arising during trial or at sentencing, all of which took place in 1989. Despite the fact that these events occurred over two years ago, Wallach did not seek recusal at the time he made his motion for new trial before me in 1990. Wallach argues, however, that the motion for recusal was not ripe until I had denied the motion and the Court of Appeals had reversed. This argument is without merit. The basis for a recusal motion is the perceived partiality of the District Court and such a motion becomes ripe at the time of the acts so perceived, and before further appearances in the District Court, not after a subsequent Appellate Court reversal.[5]

Accordingly, Wallach's motion to recuse is denied.

II. Motion to Disqualify Assistant United States Attorneys Weiss and Jacobson

Wallach moves to disqualify Assistant United States Attorneys Baruch Weiss and Elliot Jacobson from prosecuting the retrial of this case on the ground that following the Second Circuit's reversal, they are now motivated by a desire to "vindicate" themselves and further that they are necessary witnesses who will be called to testify to statements made to them by Anthony Guariglia, a former Wedtech officer who testified over days as to Wallach's actions regarding Wedtech. As each of these claims derives from the govern-

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5 The timeliness requirement is here no mere incantation of a principle. Had the motion been made in 1990 and had it been granted, a successor trial judge would doubtless be in place today and somewhat up to speed. Also, the failure to make this motion at the proper time suggests that at that time nothing had registered with Wallach and his counsel to focus their attention on a need for such relief.

ment's use of Guariglia's testimony during the first trial, the events relating to Guariglia's perjury require some detailing.

Anthony Guariglia, Wedtech's president and a member of its board of directors, early pled guilty to certain charges and entered into a cooperation agreement with the government. He took the stand in this case to testify about dealings between the defendants and Wedtech. Guariglia, a compulsive gambler, had been prohibited from gambling by a Bankruptcy Court order and agreed to this prohibition in his cooperation agreement. This was designed to conserve his assets for Wedtech's creditors. On direct examination, Guariglia testified that he had stopped gambling in the summer of 1988 and had not gambled at all from then to the time of trial in June 1989. In an effort to attack Guariglia's credibility, the defense in this case, on cross-examination, questioned Guariglia about his gambling and put before him gambling markers from an Atlantic City casino in September and October 1988. Guariglia admitted that he had signed the markers for a friend, but maintained that he had not personally gambled on those occasions. The defense then brought to the attention of the government and the Court certain record slips from the casino which defendants asserted showed that Guariglia had indeed gambled. At this point Assistant United States Attorneys Weiss and Jacobson along with the Chief of the Major Crimes Unit, Mark Hellerer, and then deputy U.S. Attorney Louis Freeh conducted an investigation including extensive questioning of Guariglia regarding his trips to Atlantic City as well as discussions with individuals who were with Guariglia on those occasions. From this, the government concluded that Guariglia had not gambled during the time of the cooperation agreement and they argued his credibility to the jury accordingly.

Several months after the trial, in December 1989, the government received new information indicating that

Guariglia had in fact gambled in Puerto Rico — not Atlantic City — during the period of the cooperation agreement. The government investigated the matter and determined that on the general gambling question Guariglia had perjured himself during the course of his testimony at trial. The government notified defense counsel and on June 26, 1990, Guariglia was indicted for perjury, a jury convicting him on February 27, 1991 of two counts of perjury committed during the course of the Wedtech trial.

Wallach moved for a new trial based on Guariglia's perjury. I denied this motion on April 4, 1990, *U.S. v. Wallach*, 733 F. Supp. 769 (S.D.N.Y. 1990), concluding that there was ". . . neither allegation nor evidence that the prosecutors had any knowledge as to Guariglia's now-disclosed perjury," and that in the total picture the perjury going to credibility was so minor as not to be material. On Wallach's appeal, however, Judges Meskill and Keenan concluded that the government "should have known" that Guariglia was committing perjury, while Judge Altimari concluded that the government had no knowledge of Guariglia's perjury. All three agreed, however, that had the jury known of the perjury, "it probably would have acquitted. . . ." There was no suggestion in the appellate opinion, though, that the prosecutors, well qualified attorneys who have developed this case for more than five years, should be relieved.

While Wallach claims that Weiss and Jacobson should be disqualified because of their alleged improper motivation in re-prosecuting Wallach in order to "vindicate" themselves and "repair the damage done by Guariglia's perjury to their own careers", Wallach offers nothing beyond mere speculation to support this. Further, Wallach's claim that they are going forward with the retrial for impermissible personal reasons, is undermined by the fact that this retrial was personally authorized by the United States Attorney for the

Southern District, Otto Obermaier, after discussions with Wallach's counsel and an opportunity for Wallach to present his arguments as to why the government should not proceed with retrial.

Secondly, Wallach seeks to disqualify Weiss and Jacobson on the ground that since Guariglia's perjury at the first trial will be in issue at the trial, Weiss and Jacobson will be necessary witnesses called to testify about statements made to them by Guariglia or, in prosecuting, will act as unsworn witnesses. Wallach asserts that in the event Guariglia takes the stand in the retrial, and denies his gambling or his false statements to the government in this regard, Weiss and Jacobson will be called to impeach him. First, it is not at all clear that Guariglia will be called as a witness, or if he is that he would deny gambling or making false statements to the government. Thus, evidence of Guariglia's perjury may not be relevant on a retrial, whether Guariglia is called or not called, and even if such evidence is deemed relevant, no showing has been made that Weiss or Jacobson will have to either testify in this regard or act as unsworn witnesses, as it is not clear that such evidence, if relevant, cannot be obtained through other heretofore fully sanctioned means.

The law does not liberally permit a defendant to call a prosecutor as a witness. On the contrary, a defendant must demonstrate a compelling and legitimate need to do so. *United States v. Schwartzbaum*, 527 F.2d 249, 253 (2d Cir. 1975), *cert. denied*, 424 U.S. 942 (1976); *United States v. Torres*, 503 F.2d 1120, 1124 (2d Cir. 1974). Where witnesses other than the prosecutor can testify to the same matters or conversations, no compelling need exists. *United States v. Roberson*, 897 F.2d 1092, 1098 (11th Cir. 1990). Consistent with the policy of the United States Attorney's office, whenever Assistant United States Attorneys Weiss and Jacobson interviewed Guariglia, a third party, and frequently

more than one additional agent, was always present. This conforms with ABA Standards Relating to the Prosecution Function stating "[t]he prosecutor should avoid interviewing a prospective witness except in the presence of a third person,"[6] which was designed to avoid precisely the problem raised by Wallach, namely that a prosecutor will be required to testify as to a conversation with a witness in the event a conflict arises. *United States v. Birdman*, 602 F.2d 547, 552-53 (3rd Cir. 1979). This policy also eliminates the risk that either Weiss or Jacobson would be put in the position of an "unsworn witness" in the event that a dispute arose as to what occurred during a conversation with Guariglia as a third party can be called and thereby remove the need for the prosecutors to question Guariglia in such a way as to bolster their own credibility. *See United States v. Dennis*, 843 F.2d 652, 656 (2d Cir. 1988) citing *United States v. McKeon*, 738 F.2d 26, 35 (2d Cir. 1984). Thus, should any conversation between Guariglia and the government become relevant, and should it become necessary to call a witness to testify as to statements made by Guariglia, a third party, other than Weiss or Jacobson could be called.

Moreover, the necessity of calling any witness to testify to matters concerning conversations or agreements between the government and Guariglia is sharply reduced, if not eliminated, by the government's offer to stipulate to much of what Wallach says he wishes to introduce through testimony of the prosecutors. Stipulations provide an adequate substitute for testimony and may eliminate the need to disqualify an attorney based on conversations between the attorney and a

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6 American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution and the Defense function. Section 3.1(f) quoted in *United States v. Birdman*, 602 F.2d 547, 552 (3rd Cir. 1979).

witness. *See States v. Diozzi*, 807 F.2d 10, 13-14 (1st Cir. 1986). The government has offered to enter into a long list of stipulations regarding Guariglia's gambling, his perjurious denial of such gambling at trial, and the fact that these actions violated his cooperation agreement. The government has also offered to stipulate further, should such additional stipulations be relevant. Wallach also has the opportunity to attack Guariglia's credibility, should such attack be relevant, by introducing evidence of Guariglia's perjury conviction, Fed. R. Evid. 609(a)(2), and may be permitted to contradict testimony given at the retrial by reading portions of the transcript from the first trial.

Given the present prosecutors' familiarity with the case, gained through the extensive involvement they have had — Weiss since the inception of the case in early 1987 and Jacobson since 1988 — it would cause an extreme waste of resources to order them now replaced. Wallach's assertion that hundreds of other Assistant United States Attorneys are available to handle the retrial is no answer and such a late-hour transfer could well severely prejudice the government. Wallach has failed to demonstrate that disqualification is necessary, and accordingly, the motion is denied.

III. Motion to Dismiss on the Ground of Double Jeopardy

Finally, Wallach moves to dismiss the indictment on the ground that the Double Jeopardy Clause bars retrial. Wallach relies on *United States v. Burks*, 437 U.S. 1 (1978), which held that the government may not retry a defendant after a reversal based on a lack of evidence. *Id.* at 11. Although throughout his brief Wallach argues that the Court of Appeals reversed his conviction because of insufficient evidence, that is not, in fact, the basis for the Court's reversal. Rather, in reversing the conviction because of Guariglia's perjury, the

Court held that, had the jury known of Guariglia's false testimony it probably would have acquitted. Nowhere in its opinion did the Court of Appeals address the sufficiency of the evidence presented by the government as to Wallach's guilt.[7]

Indeed, Wallach in his appellate brief requested that the Court dismiss the indictment. The Court of Appeals declined to do so. Not only did it state, as Wallach concedes, that it was "remand[ing] for a new trial," but the Court indicated its assumption that the case would be retried by discussing defendants' additional arguments on appeal in light of "the likelihood of a new trial," advising the District Court on a clarification that should be made in the jury instructions "in the event of retrial," and addressing an evidentiary problem which should be avoided "in the event of retrial." Accordingly, I conclude that Wallach's claim of double jeopardy is frivolous, and it is denied.

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7 Indeed, had the Court of Appeals concluded that the evidence was insufficient, it had the authority to direct a judgment of dismissal. Pursuant to 28 U.S.C. § 2106, an appellate court "may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court . . . and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." "Once the reviewing court has found the evidence to be legally insufficient, the only 'just' remedy available for that court is the direction of a judgment of acquittal." *Burks*, 437 U.S. at 18.

Accordingly, for the reasons stated above, each of Wallach's three motions is denied.

SO ORDERED.

Dated: March 30, 1992
New York, New York

/s/
U.S.D.J.